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7 **IN THE UNITED STATES DISTRICT COURT**
FOR THE EASTERN DISTRICT OF WASHINGTON

8

9 CASEY CLARKSON, on behalf of
himself and all other similarly situated

10 Plaintiff,

11 v.

12 ALASKA AIRLINES, INC.,
HORIZON AIR INDUSTRIES, INC.
and ALASKA AIRLINES PENSION/
BENEFITS ADMINISTRATIVE
COMMITTEE,

13

14 Defendants.

15

16 Case No. 2:19-cv-00005-TOR

17

18 **PLAINTIFF'S OPPOSITION TO**
ALASKA AIRLINES AND
HORIZON AIR INDUSTRIES'
MOTION TO DISMISS

19

20 **NOTED FOR HEARING:**
JUNE 11, 2019

21

22 **WITHOUT ORAL ARGUMENT**

23

24 PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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1 INTRODUCTION

2 This suit alleges violations of the Uniformed Services Employment and
3 Reemployment Rights Act (“USERRA”) against Alaska Airlines, Inc. (“Alaska”)
4 and Horizon Air Industries (“Horizon”) for failing to pay employees when they
5 take short-term military leave, even though they pay employees who take other
6 comparable forms of leave, and against Horizon for failing to properly re-employ
7 employees who take military leave and provide them with rights and benefits.

8 USERRA obligates employers to provide reservists on military leave the
9 same rights and benefits that other employees receive when they take comparable
10 forms of leave. Defendants argue that the Complaint seeks to impose a general
11 mandate for employers to pay all reservists for military leave, and that “rights and
12 benefits” owed under USERRA § 4316(b) do not include paid leave. But these
13 arguments contradict the text, legislative history, case law, and proper statutory
14 interpretation of USERRA.

15 USERRA requires that employers re-employ returning servicemembers to
16 the same position and the same seniority-based benefits that they would have
17 received if they had been continuously employed and also prevents discharging
18 employees except for cause if they take 31 days of leave. Horizon mistakenly
19 believes that these are discrimination claims. As the Complaint sufficiently alleges
20 all of these claims, Defendants’ motion to dismiss should be denied.

1 ALLEGATIONS OF THE COMPLAINT

2 Casey Clarkson worked for Horizon as a turboprop passenger aircraft pilot
3 from November 2012 until he was hired as a pilot for 737 passenger jets for Alaska
4 on November 6, 2017. Compl. & Answ. ¶ 13. He is still employed by Alaska. *Id.*
5 From at least November 2012 until June 30, 2018, Plaintiff was a member of the
6 Washington Air National Guard. Compl. ¶ 13. During his employment at Horizon
7 and Alaska, Plaintiff took leave to perform his military duties. *Id.* ¶¶ 43, 47, 56-57.

8 The Complaint alleges five claims,¹ four of which concern Defendants'
9 policies on military leave. *Id.* ¶ 17. Counts I-III allege USERRA violations by
10 Horizon under its "Virtual Credit Policy." *Id.* ¶¶ 61-78. Horizon divides its
11 turboprop pilots into three groups: Regular Line, Reduced Line, and Reserve Line
12 holders. *Id.* ¶ 39. Regular Line holders make more money and have a more
13 predictable schedule than the other two groups and is the only group that receives a
14 70-hour per month minimum guarantee. *Id.* To maintain this status, a pilot must
15 work or be credited at least 70 hours per month. *Id.* But under the Virtual Credit
16 Policy, pilots who take military leave are provided only 2.45 hours of "virtual

17

18¹ Count V alleges an individual claim for violations of ERISA § 104(b) by the
19 Alaska Airlines 401(k) Plan Pension/Benefits Administrator Committee. *Id.* ¶¶ 87-
20 94. The Committee Answered the Complaint. ECF No. 17 ("Answ.").

1 credit" per day, even though Horizon pilots work many more hours on a normal
2 working day. *Id.* ¶¶ 4, 38. This Policy caused Plaintiff (and other pilots returning
3 from military leave) to lose their status as Regular Line Holders unless they
4 worked additional hours. *Id.* ¶¶ 4, 40.

5 Count I alleges that this Policy violated USERRA §§ 4312 and 4313 because
6 employees were not reemployed in the position that they would have held but for
7 military service. *Id.* ¶¶ 61-69. Count II alleges that the Policy violated USERRA
8 § 4316(a), which requires that such employees be provided the seniority and
9 related rights and benefits that they would have attained if they had remained
10 continuously employed. *Id.* ¶¶ 70-74. Count III alleges that Horizon violated
11 USERRA § 4316(c) in applying the Policy by discharging employees from a
12 position following military leave of at least 31 days without cause. *Id.* ¶¶ 75-78.
13 Count IV alleges that both Alaska and Horizon violated USERRA § 4316(b) by
14 failing to pay employees when they take short-term military leave, but paying
15 employees who take comparable forms of non-military leave. *Id.* ¶¶ 37, 41, 79-86.

16 ARGUMENT

17 A motion to dismiss "is not a procedure for resolving a contest between the
18 parties about the facts or the substantive merits of the plaintiff's case." *Williams v.*
19 *Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008); *In re Gilead Scis. Sec.*
20 *Litig.*, 536 F.3d 1049, 1057 (9th Cir. 2008) ("[A] district court ruling on a motion

1 to dismiss is not sitting as a trier of fact.”). Instead, the only question is whether the
2 complaint sets forth a “short and plain statement of the claim showing that the
3 pleader is entitled to relief.” *Sheppard v. David Evans & Assoc.*, 694 F.3d 1045,
4 1048 (9th Cir. 2012). In evaluating this question “a court must take the allegations
5 as true, no matter how skeptical the court may be,” and the “complaint must
6 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
7 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 696 (2009) (quoting
8 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). And the Court must
9 also “draw all reasonable inferences in favor of the nonmoving party.” *Jewel v.*
10 *Nat'l Sec. Agency*, 673 F.3d 902, 907 (9th Cir. 2011).

11 **I. Counts I-III Allege Valid Claims That Horizon’s Virtual Credit Policy
12 Violated USERRA §§ 4312, 4313, 4316(a) and 4316(c)**

13 Counts I, II and III allege that Horizon violated USERRA §§ 4312 and 4313
14 (Count I) and USERRA § 4316(a) (Count II) and USERRA § 4316(c) (Count III)
15 by adopting a “virtual credit policy.” Compl. ¶¶ 61-69, 70-74, 75-78. As Horizon
16 acknowledges, the Complaint alleges that this policy caused Plaintiff (and other
17 servicemembers) to be “demoted or otherwise harmed” as a result of taking
18 military leave. Def. Mem. at 15-16 (citing Compl. ¶¶ 1, 42-49).²

19 ² Horizon attempts to contradict the factual allegations of the Complaint by
20 arguing that, at a rate of 2.45 credit hours per day, an employee on military leave

1 **A. Horizon Misconstrues Counts I-III As Discrimination Claims**

2 Despite describing the Virtual Credit Policy and how the Complaint alleges
 3 the policy harms servicemembers, Horizon assumes that USERRA *only* protects
 4 servicemembers from discrimination. Def. Mem. at 15-16. From that mistaken
 5 premise, Horizon argues that “[t]he problem” with Counts I-III is that “military and
 6 non-military” pilots and leaves of absence “are treated exactly the same.” *Id.* Yet
 7 USERRA does *not merely* protect servicemembers from discrimination: “In
 8 addition to prohibiting discrimination based on military service, *see* 38 U.S.C. §
 9 4311, USERRA [provides] protections for service members seeking restoration to
 10 employment, *see* 38 U.S.C. §§ 4312–4316.” *Kirkendall v. Dep’t of Army*, 479 F.3d
 11 830, 867 n.2 (Fed. Cir. 2007); *see Ouimette v. County of Los Angeles*, 2:12-CV-
 12 6268-ODW, 2012 WL 6214305, at *4 (C.D. Cal. Dec. 12, 2012) (explaining the
 13 same in denying motion to dismiss). These other USERRA claims do *not require*
 14 “that the employer discriminated against [the servicemember.]” *Id.* at *5; *Jordan v.*
 15 *Air Prods. and Chems., Inc.*, 225 F. Supp. 2d 1206, 1209 (C.D. Cal. 2002) (same);
 16

17 for a period of 30 days would be credited 73.5 hours, which is more than 70. Def.
 18 Mem. at 16 n.8. But a Regular Line Holder in this scenario would not be adversely
 19 affected by the Policy *only if* his or her leave period *begins on the first of a month*
 20 (and the month has at least 29 days).

1 20 C.F.R. § 1002.33. Counts I-III assert violations that do not require Plaintiff to
2 demonstrate discrimination against servicemembers.

3 Horizon discounts the allegation that the DOL investigation found that the
4 Virtual Credit Policy violated USERRA. Def. Mem. at 15 n.7. Neither of its cases
5 addressed USERRA. *Saglimbene v. Venture Indus. Corp.*, No. 89-1248, 1990 WL
6 10709, at *8 (6th Cir. 1990) (unpublished) (finding only that the district court did
7 not abuse its discretion in admitting only one of four pages of a DOL report in an
8 FLSA action); *Koellhoffer v. Plotke-Giordani*, 858 F. Supp. 2d 1181, 1185 (D.
9 Colo. 2012) (refusing to defer to the legal interpretation of the FLSA in the notes
10 by a DOL investigator). Unlike Horizon’s non-USERRA cases, DOL’s *factual*
11 findings from an investigation of USERRA claims *are relevant*. *Quinn v. Everett*
12 *Safe & Lock, Inc.*, 53 F. Supp. 3d 1335, 1339 (W.D. Wash. 2014) (denying
13 defendants’ motion in limine and finding DOL report finding USERRA violations
14 relevant and admissible). While “pure interpretations of the law are not
15 admissible,” factual determinations in a DOL report, including factual “opinions”
16 and “conclusions” are admissible and relevant. *Id.* (rejecting argument that DOL
17 “determination is not binding on th[e] Court” as a basis not to consider findings).
18 And it “is relevant and admissible as to willfulness.” *United States v. Nevada*, No.
19 09 Civ. 00314, 2012 WL 1530619, at *2 (D. Nev. May 1, 2012) (denying motion
20 to exclude DOL letter in USERRA case). Here, the Complaint also alleges the

1 DOL's findings to plead willfulness of Horizon's violations. *See* Compl. ¶¶ 58, 60.

2 **B. Count I Alleges Valid Claims under USERRA §§ 4312 and 4313**

3 Count I alleges that because the Virtual Credit Policy provides fewer credit

4 hours than Plaintiff would have received had his employment not been interrupted

5 by military leave, Horizon failed to reemploy him as required by USERRA § 4312

6 and § 4313. Compl. ¶¶ 68-69. Eligibility for reemployment under § 4312 triggers

7 § 4313's guarantee of an appropriate position. 38 U.S.C. § 4313(a). Horizon does

8 not dispute that Count I alleges that Plaintiff satisfied § 4312(a)'s requirements for

9 reemployment. *See* Def. Mem. at 16-17. Under § 4313(a), an employee must be

10 promptly reemployed in the following "order of priority":

11 (i) the position in which the employee would have been placed "if the
12 continuous employment of such person with the employer had not
13 been interrupted by such service" ("the escalator position"); (ii) the
14 position in which the employee was employed "on the date of the
commencement of the service" ("the pre-service position"); and (iii)
any other position that is "the nearest approximation" first to (i) and
then (ii) ("the nearest-approximation position").

15 38 U.S.C. § 4313(a)(1)(A)-(B) & (a)(4); 20 C.F.R. § 1002.196(a)-(c). The re-

16 employment position must "include[] the seniority, status, and rate of pay that an

17 employee would ordinarily have attained in that position given his or her job

18 history, including prospects for future earnings and advancement." 20 C.F.R.

19 § 1002.193(a). Status assesses factors such as "the employee's opportunities for

20 advancement," "working conditions," and "shift assignment." *Id.* § 1002.194.

1 Horizon assumes that because Plaintiff's title upon return to work remained
2 the same as his pre-service position, Plaintiff was properly reemployed. Def. Mem.
3 at 17. But the mere fact that the post-service position has the same title as the pre-
4 service position does not mean that they are equivalent. *Serricchio v. Wachovia*
5 *Secs. LLC*, 658 F.3d 169, 183 (2d Cir. 2011) ("[S]tatus must be assessed with
6 regard to factors beyond mere title or 'rank'"); *Middleton v. City of Sherwood*, 621
7 F. Supp. 2d 1089, 1093-95 (D. Or. 2009) (rejecting argument that position with
8 "the same title, rate of pay, and working location" satisfied § 4313); *Duarte v.*
9 *Agilent Techs., Inc.*, 366 F. Supp. 2d 1039, 1045-46 (D. Colo. 2005) (although
10 "title, pay, and benefits upon his return from active duty" were the same,
11 reemployment position was of "diminished status"). The Complaint alleges that the
12 Virtual Credit Policy caused Plaintiff to be reemployed in a Regular Line Holder
13 position of lesser status as it required him to work additional hours in order to keep
14 that position or lose it along with rights and benefits such as the 70-hour per month
15 minimum guarantee, a greater earning potential, and a more predictable schedule.
16 Compl. ¶¶ 39-40.

17 Horizon cites summary judgement and post-trial decisions. Def. Mem. at 17.
18 In *Clegg v. Ark. Dep't of Correction*, 496 F.3d 922 (8th Cir. 2007), the court
19 affirmed *summary judgment* where plaintiff was "reinstated at the same employee
20 grade" and "her rate of pay reflected two raises that were instituted while she was

1 away” and her benefits were the same. *Id.* at 930. Defendants’ other cases involve
2 similar fact patterns. *See Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299,
3 305 (4th Cir. 2006) (finding on summary judgment that the actions complained of
4 “occurred significantly *after* her return” to the same position); *Hart v. Fam. Dental*
5 *Group, PC*, 645 F.3d 561, 563 (2d Cir. 2011) (affirming trial decision that plaintiff
6 was reemployed with the same terms under his written employment agreement and
7 any adverse action occurred after). By contrast, Count I alleges that by providing
8 Plaintiff with fewer credits than if he had been continuously employed caused him
9 to be reemployed in an inferior position. Compl. ¶ 69. Thus, Count I sufficiently
10 alleges a claim under USERRA §§ 4312 and 4313.

11 **C. Count II Properly Alleges a Claim under USERRA § 4316(a)**

12 Count II alleges that Horizon violated USERRA § 4316(a) by failing to treat
13 military leave as continuous employment in determining Plaintiff’s reemployment
14 position. Compl. ¶¶ 70-74. Count II does not seek compensation based on hours
15 worked but instead the rights and benefits accompanying the Regular Line Holder
16 status that Plaintiff would have obtained but for his military leave. *Id.* ¶¶ 39-40, 74.

17 Section 4316(a) requires a reemployed employee to receive “the seniority
18 and other rights and benefits determined by seniority that the person had” on the
19 date the uniformed service began “*plus the additional* seniority and rights and
20 benefits that such person would have attained if the person had remained

1 continuously employed.” 38 U.S.C. § 4316(a) (emphasis added). “Seniority”
2 means “longevity in employment together with any benefits of employment which
3 accrue with, or are determined by, longevity in employment.” *Id.* § 4303(12).

4 Horizon argues that daily credit “beyond 2.45 hours” under the Virtual
5 Credit Policy requires performance of work and is not seniority-based. Def. Mem.
6 at 18-19. But Section 4303(12) does not require that “the number of years an
7 employee worked for an employer” be the “the sole element.” *Huhmann v. Fed.*
8 *Express Corp.*, 874 F.3d 1102, 1111 (9th Cir. 2017). In *Huhman*, the benefit was
9 seniority-based benefit where it depended on him being employed during the
10 period. *Id.* Whether a right or benefit is seniority-based depends on whether (a) it is
11 “a reward for length of service rather than a form of short-term compensation for
12 work performed”; (b) “it is reasonably certain that the employee would have
13 received the right or benefit if he or she had remained continuously employed
14 during the period of service”; and (c) “it is the employer’s actual custom or
15 practice to provide or withhold the right or benefit as a reward for length of
16 service.” 20 C.F.R. § 1002.212. Here, the rights and benefits at issue do not consist
17 of compensation for work performed but instead involve a credit while on leave.
18 Compl. ¶ 39. While Defendants argue that Plaintiff had to perform “additional
19 work” after return from military leave, that addresses “the effect” of Horizon’s
20 conduct, not the nature of the rights and benefits. Compare Def. Mem. at 18-19,

1 with Compl. ¶¶ 40, 47, 48. As to the *second and third* factors, Horizon has
 2 maintained the policies or practices that pilots must work at least 70 hours per
 3 month to keep the Regular Line Holder status and that the status provides rights
 4 and benefits such as the 70-hour per month minimum guarantee, a greater earning
 5 potential, and a more predictable schedule. Compl. ¶¶ 4, 39. Defendants do not
 6 challenge the sufficiency of these allegations or that it is reasonably certain that
 7 Plaintiff would have continued to attain that status but for his military leave.

8 Defendants suggest that seniority-based rights and benefits must “accrue
 9 automatically.” Def. Mem. at 2, 19. Neither USERRA nor the DOL Regulations
 10 require that. *See Serricchio*, 658 F.3d at 173, 190 (construing “seniority” to include
 11 pre-service “sizable book of business” on which broker compensation was based).

12 Defendants rely on pre-USERRA cases holding that vacation accrual was a
 13 form of short-term compensation for work performed and not a seniority-based
 14 benefit. Def. Mem. at 18-19 (citing *Foster v. Dravo Corp.*, 420 U.S. 92, 100 (1975)
 15 (finding “vacation scheme” to be a form of deferred compensation); *LiPani v.
 16 Bohack Corp.*, 546 F.2d 487, 490 (2d Cir. 1976) (same); *see Aiello v. Detroit Free
 17 Press, Inc.*, 570 F.2d 145, 149-150 (6th Cir. 1978) (quoting *Foster* and *LiPani*)).
 18 But these cases are consistent with the DOL’s specific carveout under USERRA
 19 that “accrual of vacation leave is considered to be a non-seniority benefit.” 20
 20 C.F.R. § 1002.150(c). As such, those cases do not apply. By contrast, Horizon’s

1 non-vacation accrual cases support the sufficiency of Count II. *Coffy v. Republic*
2 *Steel Corp.*, 447 U.S. 191, 205 (1980) (finding supplemental unemployment
3 benefits designed to “provide economic security during periods of layoff” to be
4 “perquisites of seniority”); *DeLee v. City of Plymouth, Ind.*, 773 F.3d 172, 181 (7th
5 Cir. 2014) (applying *Coffy* to benefit at issue). Thus, Count II sufficiently alleges a
6 claim under USERRA § 4316(a).

7 **D. Count III Properly Alleges a Claim under USERRA § 4316(c)**

8 Count III alleges that Horizon violated USERRA § 4316(c) by applying the
9 Virtual Credit Policy to demote Plaintiff or transfer him to an inferior position
10 following military leave without cause. Compl. ¶¶ 75-78. USERRA § 4316(c)
11 prevents employees from being “discharged from such employment, except for
12 cause – “within 180 days” after returning from military leave of “more than 30
13 days but less than 181 days.” 38 U.S.C. § 4316(c)(2). Defendants assert that
14 Plaintiff did not have military leave of at least 31 days. Def. Mem. at 20. But the
15 Complaint alleges that Plaintiff took leave “to perform National Guard service
16 from June 8 until July 8, 2017” – a period consisting of 31 days. Compl. ¶ 43.

17 Horizon also argues that Plaintiff’s demotion to a Reserve Line Holder does
18 not qualify as discharge “without cause.” Def. Mem. at 20. But “[i]t is crystal clear
19 that a demotion is the equivalent of a discharge.” *Foor v. Torrington Co.*, 170 F.2d
20 487, 490 (7th Cir. 1948) (finding transfer of reemployed veteran to position paying

1 less money is equivalent to discharge); *Hanson v. County of Kitsap*, 21 F. Supp. 3d
2 1124, 1142 (W.D. Wash. 2014) (demoting returning service member was same as
3 discharge under 4316); *Seiler v. Hollidaysburg Am. Legion Ambul. Serv., Inc.*,
4 CIV.A. 3:10-41, 2011 WL 4017965, at *6 (W.D. Pa. Sept. 8, 2011) (same). Thus,
5 Count III sufficiently alleges a claim under USERRA § 4316(c).

6 **II. Count IV Alleges Claims Under USERRA § 4316(b) Against Both
Alaska and Horizon**

7 Count IV alleges that Alaska and Horizon violated USERRA § 4316(b) by
8 failing to pay employees taking short-term military leave while paying employees
9 who took comparable forms of non-military leave. Compl. ¶¶ 79-86. By doing so,
10 Defendants failed to offer the same “rights and benefits … generally provided . . .
11 to employees having similar seniority, status, and pay who are on furlough or leave
12 of absence.”” *Id.* ¶¶ 80, 84 (quoting 38 U.S.C. § 4316(b)(1)). Defendants do not
13 dispute that the Complaint alleges that they provide paid leave comparable to
14 short-term military leave, but instead argue that the “rights and benefits” under §
15 4316(b) do not include paid leave. This ignores USERRA’s text, history, and
16 caselaw.

17 USERRA requires that employees who take military leave must receive the
18 same “rights and benefits” employees get when they take non-military leave. 38
19 U.S.C. § 4316(b); see *Waltermeyer v. Aluminum Co. of Am.*, 804 F.2d 821, 824-26
20 (3d Cir. 1986) (holding employees on military leave had same rights to holiday pay

1 as those on jury duty). The holding in *Waltermeyer* was codified by Congress in
 2 USERRA § 4316(b) and § 4303(2)'s definition of "rights and benefits". H.R. Rep.
 3 No. 103-65, at 18, 33-34 (1993) ("House Rpt.") ("affirm[ing] the decision in
 4 *Waltermeyer*" that persons on military leave receive "the most favorable treatment
 5 accorded any particular leave.").

6 Courts have held the "rights and benefits" under § 4303(2) that must be
 7 given equally to employees on military leave under § 4316(b) *include pay* when
 8 employees who take comparable leaves get paid. *See Brill v. AK Steel Corp.*, No.
 9 09 Civ. 534, 2012 WL 893902, at *6 (S.D. Ohio Mar. 14, 2012); *Duffer v. United*
 10 *Cont'l Holdings, Inc.*, 173 F. Supp. 3d 689, 704 (N.D. Ill. 2016); *see also Benetiz*
 11 *v. Montebello*, No. 09 Civ. 0303, 2010 WL 3814374, at *2 (C.D. Cal. Sept. 27,
 12 2010) (finding sick leave comparable to military leave for accrual of vacation).
 13 While USERRA does not impose a general mandate to pay employees on military
 14 leave, Section 4316(b) mandates equal treatment for reservists on military leave
 15 compared to employees on comparable leaves. *See Rogers v. City of San Antonio*,
 16 392 F.3d 758, 768-771 (5th Cir. 2004). That is all that Count IV alleges.

17 **A. USERRA Broadly Defines the "Rights and Benefits" That Must**
Be Given Equally During Military and Non-Military Leave to
Cover Wages When Employees Do Not Perform Work

19 Defendants argue that the "rights and benefits" in § 4302(2) which must be
 20 provided equally to those on military and non-military leave under § 4316(b),

1 implicitly exclude pay when employees are *not performing work*— i.e. when they
2 are on leave – because they are not a benefit. Def. Mem. at 7-12. The “rights and
3 benefits” in § 4303(2) must be “given an ‘expansive interpretation.’” *Pucilowski v.*
4 *Dep’t of Justice*, 498 F.3d 1341, 1344 (Fed. Cir. 2007). Congress intended them to
5 encompass “all attributes of the employment relationship.” House Rpt. at 21.

6 Section 4303(2) defines “rights and benefits” as “the terms, conditions, or
7 privileges of employment” *without any exception*, setting forth a number of broad,
8 general, and non-exhaustive illustrations of “rights and benefits” that describe pay
9 or wages (*i.e.*, “including any advantage, profit, privilege, gain” that “accrues” in
10 an employment relationship).³ As this broad definition covers all attributes of an
11 employment relationship, it also *includes wages*. Of course, wages are the top
12 “advantage” of a job and how employees “gain” from jobs, since wages account
13 for 68.6% of employee compensation. Bureau of Labor Statistics, Employer Costs
14 for Employee Compensation, <https://www.bls.gov/news.release/pdf/ecec.pdf>.

15
16 ³ Webster’s Ninth New Collegiate Dictionary 939 (1986) (“Profit” is “a valuable
17 return; gain” or “net income usually for a given period of time”); *id.* at 502 (“Gain”
18 is “resources or advantaged acquired or increased,” “act or process of gaining,” or
19 “an increase in amount, magnitude or degree”); Webster’s New World Dictionary
20 18 (1994) (“advantage” is “favorable or beneficial circumstance”).

1 Employees “profit” from jobs by receiving wages. The term ““any”” before these
 2 general illustrations of rights and benefits “ensures that the definition has a wide
 3 reach.” *Boyle v. United States*, 556 U.S. 938, 944 (2009).

4 Moreover, Section 4303(2)’s *specific illustrations* of “rights and benefits”
 5 describe types of pay that employees often get *when they do not perform work*, like
 6 “severance pay, supplemental unemployment benefits, vacations.” 38 U.S.C. §
 7 4303(2). By definition, “severance pay” and “supplemental unemployment
 8 benefits” are paid to former employees no longer performing work. Employees
 9 who take paid “vacations” are paid for not performing work. Under the Internal
 10 Revenue Code, payments from “severance pay, supplemental unemployment
 11 benefits, [and] vacations” are all taxable wages that must be reported on a W-2
 12 Form. IRS Publication 15, Employer’s Tax Guide at 15 (Dec. 17, 2018),
 13 <https://www.irs.gov/pub/irs-pdf/p15.pdf>; IRS Publication 4128, Tax Impact of Job
 14 Loss at 1-2 (2015), <https://www.irs.gov/pub/irs-pdf/p4128.pdf>. Defendants’ claim
 15 that § 4303(2) implicitly excludes pay when work not performed is inconsistent
 16 with these specific examples. *See Greenlaw v. United States*, 554 U.S. 237, 251
 17 (2008) (explaining that courts should “resist attributing to Congress an intention to
 18 render a statute so internally inconsistent.”).

19 Defendants misconstrue the verb “accrue” in § 4303(2) to argue that “rights
 20 and benefits” do not encompass wages. Def. Mem. at 8. But their definition is the

1 *secondary or alternative* one. The primary definition of accrue is “1. To come into
2 existence as an enforceable claim or right; to arise.” Black’s Law Dictionary (10th
3 ed. 2014); *see* Webster’s New World Dictionary 9 (1994); Webster’s Ninth New
4 College Dictionary 50 (1986). Applying the first definition of “accrue” means that
5 any advantage, profit, privilege gain “comes into existence” from an employment
6 relationship. Defendants do not dispute that the right to these paid leaves (*e.g.*, jury
7 duty) comes into existence from the employment relationship. And *wages do*
8 “*accrue periodically*” and “increase over a period of time,” when they are received
9 every week or two by an employee.

10 The original, prior version of § 4303(2) included a *single exemption* from
11 “wages or salary for *work performed*.” 38 U.S.C. § 4303(2) (1995) (emphasis
12 added). This express *exclusion* of only “wages or salary *for work performed*”
13 suggests it wanted to include other types of wages in § 4303(2)—wages for *work*
14 *not performed*. *Toor v. Lynch*, 789 F.3d 1055, 1061 (9th Cir. 2015) (““When
15 Congress provides exceptions in a statute, . . . [t]he proper inference . . . is that
16 Congress considered the issue of exceptions and, in the end, limited the statute to
17 the ones set forth.””). If Congress wanted to exclude *all* wages from § 4303(2), it
18 could have said just that. But it did not.

19 In 2010, Congress amended § 4303(2) for the purpose of clarifying that
20 USERRA bans wage discrimination. 156 Cong. Rec. S7656-02 (daily ed. Sep. 28,

1 2010). As Defendants concede, this amendment was to overrule an Eighth Circuit
2 decision. Def. Mem. at 8. In *Gagnon v. Sprint Corp.*, 284 F.3d 839 (8th Cir. 2002),
3 a veteran claimed he was paid \$1,000 less per year due to his military service. *Id.*
4 at 853. The Court rejected his discrimination claim under § 4311(a), as § 4311(a)
5 required his employer to have “denied him a benefit of employment,” and *at that*
6 *time* “the term ‘benefit,’ [] USERRA, specifically exclude[d] wages or salary for
7 work performed.” *Id.* In 2010, Congress overruled *Gagnon* by changing the phrase
8 “(*other than* wages or salary for work performed)” to “(*including* wages or salary
9 for work performed).” Pub. L. No. 111-275, § 701(a) (2010) (emphasis added).
10 Thus, Congress solely wanted to clarify or expand § 4303(2)’s scope by “*including*
11 wages or salary for work performed” in “rights and benefits” to bar wage bias
12 under § 4311(a) and did not intend to abandon § 4316(b) and § 4303(2)’s equality
13 rule that protects wages for work not performed as “rights and benefits.”

14 Even without considering prior case law or text, the current version of §
15 4303(2) does not exclude wages for work not performed. The *expressio unius*
16 canon does not apply where a statute uses the word “including” to introduce a list
17 of one or more items, since the term “including” is “illustrative and not limitative.”
18 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). Congress expressed
19 that the list of rights and benefits in § 4303(2) “is illustrative and not intended to be
20 all inclusive.” House Rpt. at 21. Despite agreeing that § 4303(2) was not intended

1 to be exhaustive, Defendants asks the Court to imply an exemption into § 4303(2).

2 Defendants argue that including paid leave in § 4303(2) would be
3 inconsistent with USERRA's remedies section, § 4323(d). Def. Mem. at 11. But
4 there is a reason why § 4323(d)(1)(B) includes "wages," which provides remedies
5 for all USERRA violations. Employees *lose wages* when they are fired due to
6 discrimination in violation of § 4311(a) or denied reemployment under § 4312(a).

7 It is well established that § 4323(d)(1)(B) authorizes backpay and front pay as a
8 remedy to compensate those who lose "wages" when they are no longer employed
9 by former employers, as well as liquidated damages on such lost "wages."³⁸
10 U.S.C. § 4323(d)(1)(C); *see, e.g., Petty v. Metro. Gov't of Nashville & Davidson*
11 *Cty.*, 687 F.3d 710, 716-18 (6th Cir. 2012) *Maher v. Chicago*, 463 F. Supp. 2d 837,
12 840 (N.D. Ill. 2006), *aff'd* 547 F.3d 817 (7th Cir. 2008); 20 C.F.R. § 1002.312(c)
13 (allowing recovery of "lost wages"). Thus, "wages" in § 4323(d)(1)(B) addresses a
14 different type harm than the ones protected under § 4303(2) and § 4316(b).

15 **B. USERRA's Legislative History Confirms That Payment When**
16 **Work is Not Performed Are Rights and Benefits Under § 4316(b)**

17 In addition to the plain language of § 4303(2), USERRA's legislative history
makes this conclusion even clearer. In enacting USERRA, Congress explained that
18 Section 4303(2) would define "benefit, 'benefit,' "benefit of employment,"
19 and employment related "rights and benefits." These are the rights, incident
to employment, which are protected under chapter 43. **These rights are**
20 **broadly defined to include all attributes of the employment relationship**
which are affected by the absence of a member of the uniformed services

1 because of military service. The list of benefits is illustrative and not
2 intended to be all inclusive.

3 House Rpt. at 21 (emphasis added). Thus, Congress intended all aspects of the
4 employment relationship to be within the scope of § 4303(2). Of course, wages are
5 the most significant attribute of any employment relationship.

6 In enacting § 4316(b) Congress expressed its intent, “to codify court
7 decisions that have interpreted current law as providing a statutorily-mandated
8 leave of absence for military service that entitles servicemembers to participate in
9 benefits that are accorded other employees.” S. Rep. No. 103-158, at 58 (1993)
10 (“Senate Rpt.”) (citing *Waltermeyer*, 804 F.2d 821). It “affirm[ed] the decision in
11 *Waltermeyer* [], that to the extent the employer policy or practice varies among
12 various types of non-military leaves of absence, the most favorable treatment
13 accorded any particular leave would also be accorded the military leave, regardless
14 of whether the non-military leave is paid or unpaid.” House Rpt. at 33-34. Thus,
15 Congress intended that employees on military leave have the same right to pay as
16 employees who take other leaves and perform no work.

17 **C. Courts Have Held § 4316(b) Requires Employees to be Paid for
Military Leave When Employees Are Paid for Comparable Leave**

18 Courts have held Section 4316(b)’s equality rule requires military leave to
19 be paid if employees who take comparable leave are paid. *Brill*, 2012 WL 893902,
20 at *6 (holding military duty comparable to jury duty and reservists on military duty

1 entitled to same pay as those on jury duty); *Duffer*, 173 F. Supp. 3d at 704 (holding
2 military leave comparable to jury duty and sick leave and employer paying wages
3 to those on such leave must pay wages to those on military leave). *Brill* held §
4 4316(b) mandates equal wages for employees who take military leave and jury
5 duty, as it “was intended to codify [*Waltermeyer’s*] equality rule.”

6 Defendant would not be providing anything it does not already
7 provide to employees on jury duty/witness leave by paying Plaintiff
8 his full salary for time spent on military leave. Actually, by paying an
employee in this manner, Defendant would be complying with the
statutory mandate to give the employee the most favorable treatment
accorded any comparable form of leave.

9 *Brill*, 2012 WL 893902, at *5-6 (citing House Rpt. at 33-34).

10 **D. USERRA Must Be Interpreted Liberally and Consistent With
11 Prior Case law**

12 Defendants ignore two canons of interpreting USERRA. *First*, USERRA is
13 “to be liberally construed for the benefit of those who left private life to serve their
14 country in its hour of great need.” *Ziober v. BLB Res., Inc.*, 839 F.3d 814, 819 (9th
15 Cir. 2016) (quoting *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275,
16 285 (1946)). Any “interpretive doubt is to be resolved in the veteran’s favor.”
17 *Brown v. Gardner*, 513 U.S. 115, 118 (1994). This canon “remains in full force
18 and effect” under USERRA. House Rpt. at 19; *see also* Senate Rpt at 40. *Second*,
19 the “case law that had developed under [predecessor] statutes remain[s] in full
20 force and effect, to the extent it is consistent with USERRA.” *Paxton v. City of*

1 *Montebello*, 712 F. Supp. 2d 1007, 1013 n.11 (C.D. Cal. 2010) (quoting 20 C.F.R.
 2 § 1002.2)); House Rpt. at 19; Senate Rpt. at 40. Thus, USERRA is meant “to be
 3 read as a whole, since the meaning of statutory language, plain or not, depends on
 4 context.” *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991).

5 **E. Properly Applying USERRA § 4316 Will Not Impose a General or
 Absolute Mandate on Employers to Provide Paid Military Leave.**

6 Defendants belabor that USERRA does not impose an absolute mandate to
 7 pay employees whenever they take military leave. Def. Mem. at 3-6. But Count IV
 8 only alleges that § 4316(b) requires pay for short-term military leave when an
 9 employer pays employees for comparable leave. Compl. ¶¶ 80-84. From the
 10 premise that USERRA does not *always* require paid military leave, Defendants
 11 argue that USERRA *never* mandates paid military leave. Def. Mem. at 4-7. This
 12 assertion is devoid of logic and ignores case law, the statute and legislative history.
 13

14 *First*, Defendants cite *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981), to
 argue that the VRRA did not impose a general “guarantee” of paid military leave.
 15 Def. Mem. at 5. But the Third Circuit distinguished the reservist in *Monroe* who
 16 wanted the same rights as *working* employees from a reservist who wanted the
 17 same right to holiday pay given to employees on jury duty who were not working.
 18 *Waltermeyer*, 804 F.3d at 823. In enacting § 4316(b), Congress adopted *Waltermeyer*
 19 to apply to comparable leaves for employees *not working*. House Rpt. at 33-34.

20 *Second*, Defendants cite cases where courts rejected the argument that if an

1 employer *voluntarily* gives *paid military leave* as a benefit only to reservists,
2 failure to follow the policy is discrimination under USERRA § 4311(a). Def. Mem.
3 at 4-5 (citing *Duncan v. Tyco Fire Prods.*, No. 16 Civ. 916, 2018 WL 3303305, at
4 *4 (N.D. Ala. July 5, 2018); *Miller v. City of Indianapolis*, 281 F.3d 648, 650 (7th
5 Cir. 2002); *Brooks v. Fiore*, No. 2000 Civ. 803, 2001 WL 1218448, at *9 (D. Del.
6 Oct. 11, 2001)). These cases did not address whether military leave should be paid
7 based on other comparable leave or Sections 4303(2) and 4316(b). *Id.* But cases
8 that *did* interpret § 4303(2) to decide if paid leave policies are “rights and benefits”
9 for § 4311(a) claims have held voluntary paid leave for military service is a “right
10 or benefit” under § 4303(2). *Pucilowski*, 498 F.3d at 1344; *United States v.*
11 *Missouri*, 67 F. Supp. 3d 1047, 1050-51 (W.D. Mo. 2014). Thus, wages when no
12 work is performed (e.g. military leave) are “rights and benefits” under USERRA.

13 *Third*, the regulations and handbooks cited by Defendants merely describe
14 the general principle that USERRA does not generally require paid military leave.
15 Def. Mem. at 6. None address § 4316(b)’s application to comparable paid leaves.
16 But the DOL described the “rights and benefits” that must be provided to
17 employees on military and comparable leaves, and must be applied to various types
18 of pay for work not performed *without any indication that wages for work not*
19 *performed are excluded*. 70 Fed. Reg. 75246, 75262-64 (Dec. 19, 2005).

20 *Fourth*, Defendants quote a treatise that “[g]enerally, USERRA does not

1 require employers to pay employees wages for time spent performing military
 2 service.” Def. Mem. at 5 (quoting Kathryn Piscitelli *et al.*, The USERRA Manual §
 3 3:5 (2018)). But the next sentence explains: “Nonetheless there are circumstances
 4 under which an employee on military leave would be entitled to pay,” and refers to
 5 cases applying § 4316(b)’s mandate to pay for military leave. *Id.*

6 *Fifth*, Congress’ enactment of 15 days of paid military leave for federal
 7 employees, 5 U.S.C. § 6323(a)(1), cannot vitiate rights Congress expressly and
 8 later adopted in USERRA. *See* Def. Mem. at 6. “[W]hen two statutes are capable
 9 of co-existence, it is the duty of the courts, absent a clearly expressed
 10 congressional intention to the contrary, to regard each as effective.” *Nigg v. U.S.*
 11 *Postal Serv.*, 555 F.3d 781, 785-86 (9th Cir. 2009) (quotations omitted). These
 12 laws are consistent: USERRA § 4302(a) provides that other federal laws can grant
 13 rights beyond USERRA. The limited paid leave § 4316(b) does not stop paid leave
 14 from being given under § 6323(a)(1). Indeed, paid leave under § 6323(a)(1) is a
 15 “benefit” under § 4303(2). *Pucilowski*, 498 F.3d at 1344.

16 *Finally*, USERRA’s mandate for continued health and pension benefits in §
 17 4317 and § 4318, respectively, does not address Congress’ intent on § 4316(b). At
 18 best, it shows that Congress did not adopt an general paid military leave mandate.

19 **F. The Consequences of Applying § 4316(b) As Written Will Be
 20 Minimal and Cannot Trump the Text and History of USERRA**

Defendants suggest a parade of horribles may occur if § 4316(b) is properly

1 applied. Def. Mem. at 12-14. But a law is not disregarded because an employer
2 thinks it may have negative consequences. *Sebelius v. Cloer*, 569 U.S. 369, 381
3 (2013). Congress presumably was aware of laws requiring forms of leave
4 comparable to short-term military leave. See Def. Mem. at 13. Not only was §
5 4316(b) enacted to re-affirm *Waltermeyer's* equality rule and codify an expansive
6 definition of “rights and benefits,” but mandating paid military leave under limited
7 circumstances fulfills USERRA’s purpose to “eliminat[e] or minimiz[e] the
8 disadvantages to civilian careers” from military service. 38 U.S.C. § 4301(a)(1).
9 The impact is small. Less than 1% of employees in the labor force are reservists,
10 about 1.1 million reservists out of 162 million workers.⁴ Even if this was a proper
11 consideration, such a limited obligation to provide paid short-term military leave to
12 a small part of the labor force could not have a major impact.

13 CONCLUSION

14 For the foregoing reasons, Defendants’ Motion to Dismiss should be denied.

15

16 ⁴ See Dep’t of Defense, 2016 Demographics: Profile of the Military Community 59
17 (2016), [https://download.militaryonesource.mil/12038/MOS/Reports/2016-](https://download.militaryonesource.mil/12038/MOS/Reports/2016-Demographics-Report.pdf)
18 Demographics-Report.pdf; Bureau of Labor Statistics, Employment Situation
19 Summary Table A. Household data, seasonally adjusted (May 3, 2019),
20 <https://www.bls.gov/news.release/empsit.a.htm>.

1 Dated: May 21, 2019

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1 **CERTIFICATE OF SERVICE**

2 I certify that on May 21, 2019, I caused the foregoing to be electronically
3 filed with the Clerk of the Court using the CM/ECF system, which sent notification
4 of such filing to all counsel of record.

5
6 *Matthew Z. Crotty*
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